

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN BURGARDT)	
Claimant)	
VS.)	
)	
BUCKNER & MOORE, INC.)	Docket No. 233,688
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent requested Appeals Board review of the June 19, 1998, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge granted claimant's request for medical treatment and temporary total disability benefits, finding claimant had suffered a work-related low-back injury while employed by the respondent. Respondent contends claimant's low-back injury occurred at home and is not related to his employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue raised by the respondent is a jurisdictional issue listed in K.S.A. 1997 Supp. 44-534a.

Claimant alleges he hurt his low back while working for the respondent as a carpenter on April 15, 1998, and again on May 6, 1998. Claimant testified his work activities on April 15, 1998, required him to continuously crawl in and out of a four foot trench and carry lumber and tools to and from the trench. After work, claimant went home and sat down in a chair to watch television for approximately two hours. Claimant testified, as he got out of the chair, he noticed a slight pain in his low back. The pain and discomfort in his low back worsened during the night, and claimant was unable to work the next day.

Claimant testified he telephoned Ron Pledger, respondent's superintendent, the next morning on April 16, 1998. He notified Mr. Pledger that he had hurt his low back and could not work that day. Claimant testified he told Mr. Pledger he noticed pain in his back when he got up from a chair at home. Claimant also testified he told Mr. Pledger he thought he had hurt his back at work climbing in and out of the trench.

Respondent referred claimant to Industrial Medicine Associates/Minor Emergency Center. Claimant was examined by a physician at the Emergency Center on April 20, 1998. Those medical records were offered and admitted into evidence at the preliminary hearing. The records indicate claimant gave a history to the Emergency Center that he injured his back at work getting in and out of the trench. However, the records also indicate that claimant's illness/injury occurred while getting out of a chair at home. Claimant was diagnosed with a low-back strain and released to return to work with no restrictions.

Claimant returned to work and testified he was able to perform his work activities until May 6, 1998. On that date, claimant testified his back again became symptomatic as he was sitting and nailing two-by-fours to forms. He notified Mr. Pledger again that he had pain and discomfort in his low back. At that time, claimant indicated he wanted to go to a chiropractor for treatment. Claimant testified he did go to a chiropractor that evening after work and received treatment.

The next day claimant returned to work and told Mr. Pledger the chiropractor had advised he needed further treatments. At that time, Mr. Pledger terminated claimant's employment with the respondent.

At the time of the regular hearing, June 16, 1998, claimant was not employed and testified that his back remained symptomatic and because of his low-back problem he was not looking for work.

At the request of claimant's attorney, Pedro Murati, M.D., performed an independent medical evaluation of claimant on May 18, 1998. Dr. Murati diagnosed claimant with a lumbosacral strain with L5 radiculopathy. He recommended claimant not work at that time. The doctor also recommended claimant undergo a nerve conductive study/EMG, an MRI examination, physical therapy and, depending on the outcome of the NCS/EMG results, additional treatment in the form of epidural injections, and a possible need for a surgical evaluation.

Ronald Pledger, respondent's job superintendent, also testified in person at the preliminary hearing before the Administrative Law Judge. Mr. Pledger testified claimant notified him on April 16, 1998, that his back had went out on him at home. Mr. Pledger also testified and his investigation report, which was admitted into evidence, indicated that claimant told Mr. Pledger he thought he had injured his back at work. However, Mr. Pledger testified he told claimant since he had not reported the injury when it happened at work, then the injury was not related to his work. At that time, claimant told Mr. Pledger if that was the case, he should have came to work that morning and then notified the respondent he

had a work-related injury so he could receive medical treatment. Because claimant made that statement, Mr. Pledger testified he felt claimant's alleged back injury was a fraudulent claim.

Mr. Pledger first testified the reason claimant was terminated on May 7, 1998, was because of his excessive absenteeism. However, on cross-examination, Mr. Pledger admitted claimant was terminated because he notified Mr. Pledger on May 6, 1998, that his low back had again become symptomatic because of his work activities.

The Appeals Board acknowledges there is a discrepancy in the testimony between claimant and respondent's superintendent, Ronald Pledger. Both of these witnesses testified in person before the Administrative Law Judge at the preliminary hearing. Accordingly, the Administrative Law Judge had the opportunity to judge their demeanor and assess their credibility. The Administrative Law Judge, in granting claimant's preliminary hearing requests, had to find claimant a credible witness. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusion because she had the opportunity to observe the witnesses testify. The Appeals Board finds, giving some deference to the Administrative Law Judge, that it is more probably true than not that claimant's low-back strain was caused by the strenuous physical work he had to perform while working on April 15, 1998, for the respondent. The Appeals Board also finds claimant's low back was again aggravated by his work activities on May 6, 1998.

Furthermore, the Appeals Board finds the simple act of getting out of a chair at home did not constitute a separate nonwork-related injury. Therefore, the Appeals Board concludes, at this juncture of the proceedings, the Administrative Law Judge's preliminary hearing Order should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Nelsonna Potts Barnes' June 19, 1998, preliminary hearing Order should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Joni J. Franklin, Wichita, KS
Ronald J. Laskowski, Topeka, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director